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No. 77-1367

In the Supreme Court of the United States

OCTOBER TERM, 1977

LAWRENCE MALCOLM WELSH, a/k/a JOHNNIE WELSH,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the court of appeals erred in relying upon the district court's statement regarding what transpired during a portion of the trial proceedings that was not transcribed because of a wholly inadvertent erasure of the reporter's tape recording.

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of attempting to collect an extension of credit by extortionate means, and of conspiracy to commit that crime, in violation of 18 U.S.C. 894. He was sentenced to 18 months' imprisonment and was fined $5,000. The court of appeals affirmed on December 14, 1977 (Pet. App. 36-38). The petition for a writ of certiorari was filed on March 15, 1978, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court.

Petitioner's claims that he was prejudiced on appeal by the unintentional destruction of a portion of his trial transcript and that the court of appeals improperly relied upon the district court's version of the unrecorded events at trial are identical to those presented in the petition for a writ of certiorari filed by his co-defendant, Robert E. Brown, in No. 77-1005, which was denied on April 3, 1978. For the reasons stated in our brief in opposition in that case, a copy of which we are sending to petitioner, the petition for a writ of certiorari should be denied.[1]

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1978.

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[1]Petitioner's assertion (Pet. 24) that he is entitled to a new trial because he was represented by different counsel on appeal than at trial is unpersuasive. Not only was petitioner solely responsible for the change in retained counsel, but also his trial attorney apparently was available to consult with his appellate attorney about the events at trial, including his recollection of the unrecorded proceedings. Petitioner's counsel on appeal thus had complete access to the record in the district court, as supplemented by the trial judge's findings on remand.

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